Nos. 19,373 and 19,374

United States Court of Appeals

For the Ninth Circuit

JOSEPH A. MAUN, as trustee, 1962 trust for Alys Wunderlich Bachler, TOWN OF WOODSIDE, et al., *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 19,373
WILLIAM J. ADAMS and JANET K. ADAMS, et al., *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 19,374

Appeal from the United States District Court for the Northern District of California, Southern Division

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

I

THE GOVERNMENT HAS CONCEDED THAT IT IS SUBJECT TO REGULATION SO FAR AS THE SUPPLY OF ELECTRIC POWER IS CONCERNED.

The key to this controversy has been provided by the Government in its brief (pp. 35-36) when it says:

> ". . . Wherefore, A.E.C. has no intention whatsoever of interfering with the normal regula-

> tion and control of commercial electricity by the proper regulatory bodies, local or Federal; in fact, A.E.C.'s contract with P.G.&E. specifically provides for approval by the California Public Utilities Commission . . ."

but adds in the same breath (p. 36),

> "Likewise, however, A.E.C. is not bound to and has no intention of submitting its own activities, incident to SLAC, to the jurisdiction of any such local regulatory bodies."

Freely translated, this amounts to a statement that "We are subject to such state or local regulation of the transmission of electricity as we choose to be subject to."

Is this really a matter of choice, or has the Government made a fatal admission? We think that it is an admission.

The Government concedes, as it must (brief, p. 19), that ". . . it lies within the power of Congress to submit a federal agency to certain regulations or control by a state."

Appellants say that Congress has done so in this case, and, by conceding that it is subject to rates approved by the California Public Utilities Commission, the Government agrees in part.

There is no inconsistency between *United States v. Oklahoma Gas and Electric Co.,* 297 Fed. 575, and *Penn Dairies Inc. v. Milk Control Com.,* 318 U.S. 261, on the one hand, and *Public Utilities Commission of California v. United States,* 355 U.S. 534, and *Paul v. United States,* 371 U.S. 245, on the other. In each

group, it is the intent of Congress which controls. And, if *Paul* controlled here, A.E.C. would not even concede that it must pay the California-fixed rates.

We think that A.E.C. construes 42 U.S.C.A. Sec. 2018 as authorizing state regulation of rates with respect to local sales of electric energy to it; we think that its acceptance of this construction is inescapably shown by its contract with P.G.&E.

The Government simply refuses to face the fact that regulation of electric transmission involves not only control of what a public utility does, and charges, but what the consumer does with the other end of the line.

We tried to make it clear in our opening brief that regulation of the consumer of electricity is a part of the total pattern of regulation of the "transmission of electric power."

This must be so, for otherwise, a public utility would build no lines, and include in its rate no charge for the construction of a line, letting the consumer build what it will, through the finest residential district, saying piously "we can not help what our customer does to reach our generating plant".

What the consumer builds adds a cost to the electricity, and is no more nor less if, in one case it is reflected in the utility's rate, and in the other is allocated by the consumer to the units of electrical energy purchased by it. Had P.G.&E. built an underground line to provide for potential demand before the A.E.C. came along, we are sure that the latter would have paid the rates, reflecting that cost, without all of this ridiculous kicking and screaming.

II

NO ACTION OF CONGRESS HAS ALTERED THE BASIC RESTRICTION ON A.E.C.'S AUTHORITITY TO ACQUIRE PROPERTY.

A.E.C.'s basic authority to acquire property is contained in 42 U.S.C.A., *Chapter* 23. This chapter also contains Section 2018, providing:

> "Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale, or transmission of electric power."

Parenthetically, we may remark that this section does not stand alone. It is necessary to consult the Federal Power Act, State laws, and local ordinances to put content into the restriction. We fail to see how any of these is irrelevant.

Authority to acquire property, therefore, is subject to the *express* limitation that it must not "affect the authority of any . . . local agency with respect to the transmission of electric power."

Authority to acquire property, whether given in the basic act, or impliedly, by an appropriation which may be used "for the acquisition or condemnation of any real property . . ." (Appellee's Brief, p. 21) is still subject to the unamended limitations of Section 2018.

The Government's contention concerning "ratification" of the A.E.C.'s position (Appellee's Brief, pp. 28-32) is specious.

Congressman Hosmer made a speech before the House adopted H.R. 10945, providing funds for A.E.C. We are unable to find in that bill the slightest

indication that Congress was dealing with the condemnation of a power line easement to serve SLAC. His speech was as irrelevant to the matter under consideration as would have been a speech defending motherhood. If a single Congressman can amend a law by making a speech not germane to a bill under consideration we would venture to say that there are few laws in effect today.

CONCLUSION

We submit that the Government has conceded that it is subject to regulation in this matter, and that the regulations of the Town of Woodside and of the County of San Mateo must be given effect.

Respectfully submitted,

AUSTIN CLAPP,

Of Counsel for Appellants.

CIVIL NO. 19339

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CAROL LEE CHAPMAN,

Plaintiff-Appellee
and Cross-Appellant,

vs.

FIRST INSURANCE COMPANY OF
HAWAII, LTD.,

Defendant-Appellant
and Cross-Appellee.

See also Vol. 3312

PETITION FOR REHEARING

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CIVIL NO. 19339

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CAROL LEE CHAPMAN, Plaintiff-Appellee and Cross-Appellant, vs. FIRST INSURANCE COMPANY OF HAWAII, LTD., Defendant-Appellant and Cross-Appellee.	)

PETITION FOR REHEARING

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND THE JUDGES THEREOF:

CAROL LEE CHAPMAN, plaintiff-appellee and cross-appellant in the above-entitled cause, presents this her petition for rehearing of the above-entitled cause and in support thereof respectfully shows:

1. This court has held that Miss Chapman cannot assert the claim of Mrs. Brown and Mrs. Chase against the First Insurance Company for breach of a promise to defend. This holding is in direct conflict with the case law of the State of Hawaii. This court, in so holding, apparently overlooked that aspect of Yuen v. London Guar. & Acc. Co., 40 Haw. 213 (1953), which holds that an insured's judgment creditor may recover directly against an insurer on an estoppel

arising from facts independent of policy coverage. Furthermore, this Ninth Circuit holding is directly contrary to the law as summarized by the most recent statement in 8 Appleman, Insurance Law and Practice, § 4831 "Right to Sue Insurer - Liability Policies" (1965 Supp.).

2. The court has held that Miss Chapman cannot recover because the admitted detrimental and reasonable reliance of Mrs. Brown and Mrs. Chase upon First Insurance's promises would not support an estoppel in their favor extending coverage to the policy limit. To sustain a policy limit estoppel, this court apparently would require a detrimental reliance in an indemnity for loss sense. This holding, however, is directly contrary to the opinion of the Hawaii Supreme Court in Yuen v. London Guar. & Acc. Co., 40 Haw. 213 (1953), which held that the insured's judgment creditor - who could not conceivably be said to have detrimentally relied in an indemnity for loss sense - could recover the full judgment directly against the insurer based on estoppel. Indeed, in the Yuen case, the insured was specifically informed prior to trial that no coverage existed under his policy; the insured's only detrimental reliance in that case was on the insurer's promise to defend.

3. The result of this court's reversal of the judgment below creates an anomaly when considered in connection with Yuen v. London Guar. & Acc. Co., 40 Haw. 213 (1953), a decision of the Supreme Court of Hawaii, controlling under

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

This court holds that defendant's insureds, had they paid plaintiff Chapman's judgment against them, could not recover that amount against defendant First Insurance Co. notwithstanding a breach by defendant of its promise to defend. Yet had defendant fulfilled its promise to defend, then under Yuen v. London Guar. & Acc. Co., the insureds - and this judgment creditor - would have been entitled to recover the full amount of judgment up to the limits of the policy. Thus, defendant, by the breach of its promise to defend, escapes the very liability which it would have incurred by keeping that promise.

4. This court, although it considered the trial court's finding that defendant made a promise of coverage to its insureds in bad faith and to protect its own self interest, apparently overlooked the following additional findings of fact by the trial court:

a. That the actions of the defendant toward its insureds constituted conscious culpability on the part of the defendant;

b. That defendant acted in bad faith violation of a Hawaii statute by seeking to protect the interest of other insureds to the detriment of Mrs. Brown and Mrs. Chase;

c. That the insureds were prejudiced in the loss of the opportunity to enter settlement negotiations prior to suit; and

d. That the insureds were prejudiced in that they lost the opportunity to promptly investigate plaintiff's claim, which loss was per se prejudicial according to the uncontradicted testimony of all expert insurance witnesses in this case, both for plaintiff and defendant.

This court did not overrule these findings of fact of the trial court, although they were apparently not viewed in a light most favorable to plaintiff. This court's conclusion that Mrs Brown and Mrs. Chase did not detrimentally rely on defendant's representation of coverage in an indemnity for loss sense apparently overlooked the trial court's findings c and d above, which show insureds' reliance on the promise of coverage. These findings state that the insureds were prejudiced in the loss of opportunity both to settle the case and to investigate the facts before suit was filed. Had defendant, instead of promising as it did both to cover and to defend, initially denied coverage but promised to defend, it is reasonable to expect that the insureds themselves would have taken steps at least to enter settlement negotiations.

5. There existed a division of opinion among judges of this court on plaintiff's cross-appeal. Because of this division of opinion on the scope of coverage provided in this products liability policy, and the importance of this question both to businessmen and the insurance industry, it is suggested that this court en banc consider the serious questions raised by Merrill, J. in his dissenting opinion on the cross-appeal, and the reformation issue raised on plaintiff's own appeal.

6. This court has not questioned the trial court's findings of fact. As a result of this case, therefore, an insurance company may with conscious and gross culpability, in bad faith, and in violation of state statute breach its obligations to its insureds by a misrepresentation of coverage, for the admitted purpose of fulfilling its own self-interest, and thereafter walk away with impunity even though such machinations work to the admitted prejudice of the insureds.

In light of this result and its obvious serious implications with respect to fair dealings of an insurer with its insureds, it is respectfully suggested that full court en banc consider both the appeal and cross-appeal of this case.

For the reasons stated above, petitioner requests that a rehearing be granted and that on such rehearing the judgment of this court be reversed and the judgment of the United States District Court for the District of Hawaii be affirmed.

DATED: Honolulu, Hawaii, December 17, 1965.

Respectfully submitted,

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Of Counsel:

ANDERSON, WRENN & JENKS

CERTIFICATE

CAROL LEE CHAPMAN, plaintiff-appellee and cross-appellant herein, by her attorney hereby certifies that the foregoing petition for rehearing is not presented for the purpose of delay or vexation, but is, in the opinion of counsel, well-founded in law and proper to be filed herein.

FOR

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